

ROCKY MOUNTAIN PIPELINE TRADES COUNCIL

IBLA 99-107

Decided July 29, 1999

Appeal from a decision of the Utah State Office, Bureau of Land Management, granting right-of-way application UT-942LS.

Affirmed.

1. Rights-of-Way: Act of February 25, 1920--Rights-of-Way: Applications--Rights-of-Way: Oil and Gas Pipelines

A BLM decision granting an application for a right-of-way under 30 U.S.C. § 185 (1994), is an exercise of discretion that will be affirmed on appeal when the record shows the decision to be a reasoned analysis of the factors involved, made in due regard for the public interest, and where no sufficient reason to disturb the decision is shown.

2. Mineral Leasing Act--Rights-of-Way: Generally--Rules of Practice: Appeals: Burden of Proof

The burden is on an appellant, who challenges a BLM decision granting a right-of-way application, to demonstrate by a preponderance of the evidence that BLM erred in the evaluation of data from agency heads that control Federal lands supporting approval, and in its conclusions.

APPEARANCES: Joseph M. Santarella, Jr., Esq., and Susan J. Eckert, Esq., Littleton, Colorado, for Rocky Mountain Pipeline Trades Council; John F. Shepherd, Esq., and Charles P. Henderson, Esq., Denver, Colorado, for Mid-America Pipeline Company; A. Scott Loveless, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Rocky Mountain Pipeline Trades Council (Appellant or RMPTC) has appealed from an October 30, 1998, decision of the Branch Chief, Lands, Utah State Office, Bureau of Land Management (BLM), granting right-of-way (ROW) application UT-942LS to Mid-America Pipeline Company (MAPCO) to construct a steel pipeline, approximately 412 miles in length, to transport

petroleum products from the existing Kutz Station in San Juan County, New Mexico, to Brown's Park in Daggett County, Utah.

The proposed route of the pipeline would traverse an existing ROW across private, BLM, Bureau of Reclamation, and U.S. Forest Service (USFS) lands, and Southern Ute Tribal Trust lands held in trust by the Bureau of Indian Affairs. The Utah State Office, BLM, is the designated lead agency for the project and the USFS is a cooperating agency. BLM involvement is required because 43 C.F.R. § 2882.2-2(b) directs that ROW applications be filed with BLM where more than one Federal agency is involved. The Board denied Appellant's Request for Stay of the BLM decision on March 5, 1999, and, in the same Order, granted MAPCO's request to intervene.

The October 30, 1998, decision (Decision) appealed from determined, in pertinent part:

The decision is to issue a ROW grant to Mid-America Pipeline Company (MAPL) for the Mid-America Rocky Mountain Loop Expansion Project, as proposed (the Proposed Action). This grant is issued pursuant to the Mineral Leasing Act of 1920 (30 U.S.C. 185) and the rules and regulations in 43 CFR 2880. The ROW grant includes the installation of 52 miles of 12.75- inch, 138 miles of 10.75- inch, and 222 of 16-inch outside diameter pipe, a scraper trap at each of 10 existing pump stations, and 93 block valves.

(Decision at 1.)

In its Notice of Appeal and Motion to Set aside and Request for Hearing (NOA), Appellant asserts that the BLM Decision Record (DR) fails to establish that (1) BLM took a hard look at potential environmental impacts of the MAPCO Loop Expansion Project, or (2) BLM made a convincing case that no significant impact will result therefrom or that such impact will be reduced to insignificance by the adoption of appropriate mitigation measures as described in RMPTC's Memorandum in Support (Memorandum). (NOA at 1.)

In its Memorandum, Appellant claims that BLM's Decision Record/Finding of No Significant Impact (DR/FONSI) is premised on the following clear errors of law:

- * The DR/FONSI contains numerous omissions, factual inaccuracies and inconsistencies with referenced technical documents in the DR and fails to provide adequate technical data and references to support many of GBLM's findings in violation of section 102(2) of NEPA [National Environmental Policy Act of 1969] and 40 C.F.R. § 1500.1(b); Failure to provide the public with accurate information on the MAPCO Loop Expansion Project impacts on the human environment in violation of section 102(2)(C) of NEPA and 40 C.F.R. §§ 1500.2, 1506.6(f);

- * BLM materially compromised the public's ability to comment meaningfully on the MAPCO Loop Expansion Project impacts on the human environment by failing to provide the public with the Biological Assessment ("BA"),[] Biological Opinion ("BO"),[] and other referenced documents in the EA, which formed the basis of BLM's determination to issue a FONSI for the MAPCO Loop Expansion Project, in violation of section 102(2)(C) of NEPA and 40 C.F.R. §§ 1500.2, 1506.6(f);
- * BLM has predetermined impacts of the proposed MAPCO Loop Expansion Project on threatened and endangered species prior to completion of certain species surveys within the BA and issuance of the BO by the United States Fish and Wildlife Service ("USFWS") in violation of section 102(2)(A) and (C) of NEPA, and 40 C.F.R. §§ 1500.1, 1500.2, 1501.6(a), 1503.1(a)(1);[]
- * Failure to respond or address comments and concerns raised by the public during the public comment period in violation of section 102(2)(C) of NEPA, and 40 C.F.R. §§ 1500.1, 1500.2(d), and 1503.4;
- * Failure to respond or address comments and reservations raised by the USFWS, a cooperating agency with jurisdiction, including comments relating to the inadequacy of the discussion in the EA relating to surface water contamination at the Atlas Mill Tailings Site and description of surface water quality in the Colorado River in violation of section 102(2)(C) of NEPA, and 40 C.F.R. §§ 1500.1, 1500.2(j), and 1503.4; and,
- * The DR/FONSI fails to adequately distinguish between the impacts of the proposed MAPCO Loop Expansion Project, the TransColorado Pipeline Project where an EIS [Environmental Impact Statement] was required, and the Longhorn Partners Pipeline Project where the United States District Court for the Western District of Texas in Spiller v. Walker, 1998 U.S. Dist. LEXUS 18341 (August 25, 1998), recently issued an injunction and ordered the conduct of an EIS in accordance with section 102(2)(A) of NEPA and 40 C.F.R. § 1501.4.

(Memorandum at 11-13.)

In amplification of these claims, Appellant states that the MAPCO Loop Expansion Project EA discusses reseeding requirements at page 4-15, but does not reflect whether the Natural Resources Conservation Service has been contacted to define its role in reseeding requirements. (Memorandum

at 14.) Appellant also claims that no reference is made in the EA to Conservation Reserve Program (CRP) lands. RMPTC states that no discussion in the EA is provided as to whether these lands are to be crossed by the proposed action or how disturbed CRP lands are to be mitigated consistent with section 102(2)(C) of NEPA and implementing regulations. (Memorandum at 14-15.) Similarly, Appellant states that the EA failed to discuss the location of the work camp to be built at Baxter Pass and the impact of the camp on the human environment. (Memorandum at 15.)

Appellant claims that the EA at page 4-69 is factually incorrect when it states that "[t]he pipeline would be adjacent to an existing pipeline within Mid-America's existing 50 foot easement and no additional permanent commitments of land for the ROW would be required." Appellant avers that miles of existing easements across private lands are only 15 feet wide with some other ROW's being only 35 feet wide. Appellant concedes that this error was corrected within the DR/FONSI, but argues that the misstatement within the EA is a violation of the requirement within NEPA that the public be provided accurate information from which to evaluate a project. (Memorandum at 15-16.)

Further, Appellant claims that BLM failed to adequately address the endangered plant species, Ute Ladies' Tresses, when it concluded in the EA that this species would not likely be adversely impacted, because information regarding possible impact to the species had not been collected at the time. (Memorandum at 16.) RMPTC states that although BLM asserts that it will conduct field surveys in order that it can mitigate damage to the species, it (BLM) does not adequately explain how this mitigation will occur, or how MAPCO will avoid impact to the species during construction of the pipeline when the plant is not readily identifiable. Id.

Appellant next asserts that BLM's FONSI determination is premised on clear errors of law because it failed to provide the public with accurate information on project impacts on the human environment. (Memorandum at 17.) To make this claim, RMPTC states that the EA lists six endangered or threatened species that were initially considered for potential impact, but were then eliminated from consideration without explanation. Id. Appellant states that although an explanation was included within the BA, the explanation should have been included within the EA in order that the public could have meaningfully evaluated the appropriateness of the species' elimination from consideration. Id. Similarly, Appellant claims, a major difference regarding fish species that may be impacted exists between the level of detail provided in the EA and BA, respectively, with the public being provided significantly less information in the EA than the USFWS was provided in the BA. RMPTC claims that more detailed information on these threatened or endangered fish species in the EA (or greater availability of the full BA to the public) is necessary to satisfy section 102(2)(C) of NEPA and 40 C.F.R. §§ 1500.2 and 1506.6. (Memorandum at 18.)

Appellant claims that although the EA states that five populations of the endangered plant species White River Penstemon totaling 1,000 to 1,500 individuals may be impacted by the project, the BA breaks these

populations down separately in order that the true impact may be evaluated. Appellant states that the EA should present the data in the same form as the BA, so the reader can make an informed evaluation of the possible impact of the proposed project. (Memorandum at 18-19.) Likewise, RMPTC states that the description of bald eagle habitat in the EA, where it is noted that no sign of bald eagle breeding was observed, should have included the additional information contained in the BA that an unoccupied nest 0.25 miles from the ROW was observed. (Memorandum at 19.) Similarly, Appellant asserts, the description of the impact of the project on the southwestern willow flycatcher was listed as "no effect" in the EA, while listed in the BA as "No effect to breeding flycatchers, and not likely to adversely affect migrating individuals." Id. RMPTC states that the status should be listed the same in each document to satisfy the public participation requirements of NEPA. Id.

Appellant further contends that the FONSI is premised on clear errors of law because BLM materially compromised the public's ability to comment meaningfully on the pipeline project. Id. By not providing the public with the BA and BO prior to the issuance of the DR/FONSI, Appellant claims, section 102(2)(C) was violated. (Memorandum at 20.) RMPTC also asserts that the FONSI is premised on a clear error of law because BLM predetermined the impacts on threatened and endangered species prior to its completion of the BA surveys and USFWS's BO. (Memorandum at 21.) Citing the black-footed ferret, Appellant claims that both the BA and EA state that prairie dog populations, potential habitat for the ferret, are to be surveyed from mid-July to August, after completion of the EA. Appellant argues that BLM's conclusion that this species would not likely be adversely impacted was premature and violates the requirement of section 102(2)(C) of NEPA that a reviewing agency take a hard look at environmental consequences on endangered species. (Memorandum at 22.)

Appellant urges that BLM also erred by not responding to or addressing comments and concerns raised by the public during the public comment period. For example, Appellant states, BLM failed to address RMPTC's concerns regarding the risks of constructing a new pipeline within an existing ROW and the concern of another commenter on potential impacts of constructing the pipeline near the Atlas Mill Tailings Pile. (Memorandum at 22-23.) Appellant also claims that BLM violated NEPA by failing to adequately address comments on contamination of the Colorado River by the Atlas Mill Tailings Site or address the issue of surface water quality within the Colorado River. (Memorandum at 23.)

Appellant contends that BLM's failure to adequately distinguish between the environmental impacts in the MAPCO project compared with impacts observed in other similar pipeline projects where an EIS was required raises issues of fairness and consistency, and the dissimilar treatment of similar projects violates section 102(2)(A) and (C) of NEPA. (Memorandum at 24-25.)

Appellant asserts there are demonstrable errors of fact in the EA that must be addressed as well. RMPTC states that the assertion in the EA

that all negative impacts on endangered fish species caused by the MAPCO project will be mitigated through implementation of measures addressed in the DR/FONSI fails to address uncertainties concerning the effectiveness of these mitigation measures. (Memorandum at 25.) For example, Appellant claims, by failing to discuss the National Pollutant Discharge Elimination System permit requirements and the effectiveness of these measures to mitigate project impacts on receiving waters and the endangered species that inhabit these waters, BLM's DR/FONSI is both arbitrary and capricious. (Memorandum at 25-26.)

Appellant further asserts that BLM failed to consider several substantial environmental questions of material significance to the MAPCO Loop Expansion Project. The major areas Appellant charges were not considered in the DR include all reasonable alternatives, the cumulative impacts of the existing pipeline when combined with the proposed Expansion Project pipeline, the cumulative impacts of the Expansion Project in conjunction with the TransColorado Pipeline Project and other operating or proposed pipelines located in the area, project specific impacts on wetlands and other special aquatic sites, and project specific impacts of the Project on endangered species. (Memorandum at 26-27.)

MAPCO is joined by BLM in its response (together Respondent) and incorporates the arguments in its Opposition to Appellant's Petition for Stay (Opposition) in its Answer.

Respondent asserts that RMPTC is a labor organization which "is challenging this project to put pressure on MAPCO to hire union workers," and notes that the two environmental groups that submitted comments on the EA did not appeal BLM's October 30, 1998, decision. (Opposition at 20.) Regardless of RMPTC's motivation, we find for the reasons below that its challenges are without merit.

Respondent states that the new pipeline ROW will be within the boundaries of the existing pipeline ROW for virtually the entire route (384 miles out of 412 miles). (Opposition at 2.) It states that surface disturbance will generally be confined to the existing ROW, except for a 15-foot temporary use area for construction activities. Id. Respondent claims that this disturbed area will be promptly reclaimed. Id. The existing pipeline was constructed in 1981, after preparation of an EIS. Id.

Respondent explains that BLM began preparing an environmental assessment (EA) after MAPCO submitted an application to construct the additional pipeline. (Opposition at 2.) Six public scoping meetings were conducted by BLM in March 1998 (see EA at 1-15), with comments received and BLM responses thereto during the scoping process summarized in the EA at pages 1-19 through 1-33. Id. On July 13, 1998, BLM distributed the draft EA and a preliminary FONSI for public comment during a 30 day comment period. The preliminary FONSI explained BLM's decision not to prepare an EIS, but only an EA, in this case. (Opposition at 3.) Upon request, Appellant was provided an additional 30 days to respond; and at its specific request, BLM

sent Appellant copies of several documents referred to or prepared in connection with the EA: BLM's BA, a draft Programmatic Agreement, permits and other authorizations applied for or obtained by MAPCO, and maps. Id.

BLM received comments on the draft EA and preliminary FONSI from several commenters, including environmental groups, in addition to those submitted by Appellant. (Opposition at 3, see also Comment Letter 51 submitted by Appellant.) Respondent states that on October 30, 1998, after receiving a BO from the USFWS, BLM issued its DR and FONSI for the MAPCO project. Id. Respondent notes that Attachment A to the FONSI and DR summarizes the comment letters, including Appellant's, and gives BLM's response. Id. Respondent further states that Attachment B to the FONSI and DR identifies 11 pages of BLM changes to the EA made as a result of BLM team review and public comments. Id. The EA exceeds 200 pages in length.

As Respondent explains, the BO prepared by the USFWS concludes that, with implementation of mitigation measures described in the Opinion (concerning water depletions from two river systems), there will be no jeopardy to threatened or endangered species or adverse modification of critical habitat. (Opposition at 4, citing FONSI at 4.) Respondent further claims that BLM has imposed the mitigation measures identified in the BO. Id., see FONSI at 5.

With respect to alleged discrepancies between the EA and BA for one plant species and two bird species, Respondent contends that there are no discrepancies but rather Appellant draws distinctions that do not exist. (Answer at 2.) Respondent claims that Appellant's assertion that the population figures differ between the EA and BA for the White River penstemon, a flowering plant, is incorrect. Respondent explains that the EA states that the five known populations have an estimated total of 1,200 to 2,100 individual plants, while the BA further refines this information to reflect that ground surveys documented five populations of the plant, with each population ranging from 10 plants to more than 1,000 plants. (Answer at 2; c.f. EA at 3-45, BA at 3-52.) Furthermore, Respondent states, the EA identifies mitigation measures that MAPCO will take if warranted in a construction area that encounters this plant, including avoidance, flagging, and use of construction monitors. (Answer at 2, citing EA at 4-36 to 4-37.)

Respondent claims the same inaccuracy in Appellant's charge with regard to bald eagle nesting. Respondent notes that the EA's statement concerning one inactive bald eagle nest on the pipeline route does not imply that bald eagles will breed or be present during the pipeline's short construction window, and that BLM properly relied on its analysis in the BA to conclude in the EA that "[n]o direct impacts to the bald eagle are anticipated from the proposed action." (Answer at 3, citing EA at 4-32.) By specifically incorporating the information in the BA and the EA by reference, Respondent states that BLM properly relied on the analysis of bald eagle habitat found in the BA when presenting findings in the EA. (Answer at 3.)

Respondent claims the same is true with regard to alleged discrepancies between the EA and BA for the southwestern willow flycatcher, an endangered bird species. (Answer at 3-4.) Respondent asserts that the BA summarizes the findings for this bird as "No effect/Not likely to adversely affect," while the EA summarizes the findings for this bird as "No effect." (Answer at 4; citing BA at 1-2, EA at 4-27.) The EA nevertheless addressed the potential impact to migrating individuals based on the possible reduction of riparian habitat, and the narrative discussed mitigation measures that ensure minimal impact to migrating flycatchers, including reclamation and replacement of riparian and wetland habitats. (Answer at 4; citing EA at 29-30.) Moreover, Respondent claims, the FONSI for the pipeline project contained a correction to the narrative portion of the EA's analysis, stating that "implementation of the proposed action would have no effect on breeding southwestern willow flycatchers and would thus not likely affect migrating individuals." (Answer at 4, citing FONSI Attach. B at 8.)

In answer to Appellant's charge that the conclusion in the EA that the black-footed ferret would likely be unaffected by the project was premature because the relevant studies had not been completed, Respondent states that the FONSI points out:

The preliminary conclusion that the black-footed ferret "would not likely be adversely affected" was reasonable because of the extreme rarity of this animal, the lack of recent records from the vicinity of the pipeline route, and the local disturbance caused by pipeline construction relative to the very large prairie dog colony extent. This conclusion was supported by negative findings from nocturnal ferret surveys completed in August 1998.

(Answer at 4-5; see FONSI Attach. A at 9.) Respondent explains that BLM consulted with USFWS to determine appropriate measures if critical habitat areas were discovered and that that agency concurred with the BLM that the project would not likely affect the black-footed ferret. (Answer at 5; BO at 1.) The BO stated that the USFWS' "not likely to affect" determination was contingent on completion of the prairie dog surveys prior to any ground breaking activities. MAPCO committed to implement these surveys on October 28, 1998. (Answer at 5; BO at 31.)

In response to RMPTC's allegation that BLM predetermined impacts to species before issuance of the BO (Memorandum at 20-21), Respondent answers that BLM effectively replied to this concern in its responses to comments contained in the FONSI when it stated:

The BLM based its preliminary FONSI conclusions on the facts available at the time the EA was issued. The BLM clearly recognized its coordination responsibilities under the Endangered Species Act by acknowledging that Section 7 consultation was still ongoing at the time the EA was published (Preliminary FONSI, page 2, paragraph 3). Part of BLM's responsibilities is

to assess potential impacts to listed species and to report these findings in a NEPA document. Subsequent to the release of the EA, additional field data were collected and furnished to the US Fish and Wildlife Service (Service) for their review during preparation of the Biological Opinion. The Biological Opinion will be the controlling document for the management of threatened and endangered species. Notices to proceed for this project will not be issued for effected areas until the Biological Opinion is provided by the Service. In summary, there has not been a predetermination of impacts to threatened or endangered species, as indicated by the clearly preliminary nature of the FONSI that accompanies the EA, and by the commitment by the BLM to incorporate the directives of the Biological Opinion into project stipulations prior to issuing Notices to Proceed.

(Answer at 5-6, quoting FONSI Attach. A at 14.)

Respondent claims that BLM also took the required "hard look" at wetlands, despite Appellant's assertion to the contrary. See Memorandum at 35, Answer at 6. In its Answer, Respondent notes that Appendix B of the EA summarizes the location, characteristics and widths of wetlands along the pipeline route. (Answer at 6.) Respondent states that BLM used published soil surveys and USFWS National Wetland Inventory maps to identify hydric soils, and that when available published information was lacking, implemented its own ground reconnaissance, as well as aerial reconnaissance where ground access was not possible, to chart wetland areas. Id., citing FONSI Attach. A at 12. Respondent claims that these surveys and reconnaissance initiatives, coupled with the discussion of wetlands in the text of the EA at 3-9 to 3-10, 4-9 to 4-10, constitutes a "hard look" at wetland impacts. (Answer at 6.)

In response to Appellant's objection to the EA's reliance on USFWS-developed mitigation measures to protect four endangered fish species (Memorandum at 25, 26, 39), Respondent states that the BO controls the project's impacts on threatened and endangered species and it (BO) has determined that significant impacts can be avoided by implementing the alternatives specified in the San Juan River and Upper Colorado River recovery plans. (Answer at 7, citing BO at 39-41.) The grant of the ROW, Respondent claims, is based on, among other things, implementation of the mitigation measures from the two recovery plans identified in the BO. (Answer at 7, citing FONSI at 4-5.)

In its answer to Appellant's criticism of the EA's discussion of construction techniques, to include hydrostatic testing, directional boring, and open-cut trenching (see Memorandum at 37-40), Respondent states that BLM compared the water flows of the affected rivers with the proposed depletion for hydrostatic testing and concluded that an instantaneous depletion amounts to 1 percent or less of the rivers' flow, therefore creating a minimal impact. (Answer at 7, citing FONSI Attach. A at 10.) Furthermore, Respondent states that the "used water" is not returned directly into the rivers and streams, but is discharged into a filtration

impoundment and released only after the water meets National Pollutant Discharge Elimination System standards for Utah. *Id.* Respondent claims that the discussion of this testing procedure in the EA is conducted at a level sufficient to draw a reasoned conclusion. (Answer at 7, citing EA at 2-15, 4-38.)

With regard to Appellant's criticism concerning the EA's discussion of the potential impacts of directional boring, Respondent acknowledges that the EA states that seepage of drilling mud into waterways could occur, but directs our attention to the extensive mitigation measures described in the project's Plan of Development and referenced in the EA. (Answer at 8, citing FONSI Attach. A at 10.) Finally, Respondent addresses RMPTC's claim that the EA fails to provide a rationale to support open-cut trenching at three river crossings. See Memorandum at 40. The EA provides, Respondent explains, that the trenching will occur during the low flow period of the streams in late summer and fall, such that sedimentation will be localized and not affect areas downstream where endangered fish species are found. (Answer at 8, citing EA at 4-37.) The FONSI reports the BLM-USFWS consultation in creating the open-cut trenching mitigation measures. (Answer at 8, citing FONSI Attach. A at 11.)

BLM and MAPCO also respond to RMPTC's claim that the EA fails to address the alleged safety risk of building a pipeline in an existing pipeline corridor. The EA recites, Respondent notes, that pipeline construction will conform with all applicable Department of Transportation regulations and the EA references the MAPCO Emergency Response Plan, contained in the project's Plan of Development, that is implemented in the event of a spill or leak. (Answer at 8, citing EA at 2-11, 4-75.) Of significance, the preliminary FONSI stated:

By implementing the Mid-America Emergency Response Plan outlined in Exhibit N in the Plan of Development and the mitigation measures outlined in the EA, the potential for significant impacts to public health and safety during construction or operation of the pipeline would be minimal. Operation of the pipeline would result in an estimated public fatality risk of one death each 333 years of operation, based on the U.S. incident rates for natural gas pipelines.

(Answer at 8-9, quoting Preliminary FONSI at 3.)

Finally, Respondent addresses Appellant's claim that BLM failed to distinguish the MAPCO project from the original pipeline which received an EIS. See Memorandum at 24. Respondent points to Attachment A to the FONSI where BLM stated that the EA utilized the existing pipeline corridor as the baseline for determining the significance of incremental impacts caused by the MAPCO project. (Answer at 9, citing FONSI Attach. A at 8.) Respondent states that the EA identified the cumulative impact of constructing the pipeline in the existing corridor, and concluded that the MAPCO project would not result in significant impacts to the human environment and "would not represent a change of sufficient magnitude to modify the behavior of

wildlife occupants (birds, small and large mammals)." (Answer at 9-10, citing EA at 4-75 to 4-76, FONSI at 1; EA at 4-75.)

A BLM DR and FONSI will be affirmed where the Appellant fails to establish that BLM did not adequately consider matters of environmental concern. The party challenging a BLM decision has the burden of showing by objective proof that the determination was premised on a clear error of law or a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion or disagreements do not suffice to establish that BLM's analysis is inadequate, and provide no basis for reversal. The Ecology Center, 147 IBLA 66 (1998).

Concerning BLM's environmental responsibilities, this Board has said that

[a] Federal agency must take a "hard look" at the environmental consequences of its proposed actions. * * * In reviewing whether BLM has taken a "hard look," the Board examines whether the record establishes that BLM made a careful review of environmental issues, identified relevant areas of environmental concern, and whether its final determination was reasonable.

Vulcan Power Co., 143 IBLA 10 (1998). See Friends of the Nestucca Coast Association, 144 IBLA 341, 356-57 (1998), appeal filed sub nom. Coast Range Assoc. v. Shuford, Civ. No. 98-819-JO (D. Or. July 7, 1998).

[1] As the authorized representative of the Secretary of the Interior, BLM has the discretion to accept or reject an ROW application for an oil and gas pipeline under section 28(c)(2) of the Mineral Leasing Act of 1920 (MLA), as amended, 30 U.S.C. § 185(c)(2) (1994). The MLA clearly provides that, where the surface of Federal lands crossed by a proposed pipeline is under the jurisdiction of two or more Federal agencies, the Secretary of the Interior is authorized to grant or deny the ROW. Id.

The regulations at 43 C.F.R. § 2882.3(e), indicate that an application for an ROW grant which meets the requirements of the MLA (30 U.S.C. § 185 (1994)) entitles the applicant to a full review of the application, and if the authorized officer (in consultation with the other appropriate agencies) determines that the ROW applied for would be consistent with the purpose to which the Federal lands involved have been committed, and would be in the public interest, the application may be approved.

[2] As noted above, the burden is on Appellant, as the party challenging BLM's decision, to support its allegations with evidence showing error. Conclusory allegations of error or differences of opinion, standing alone, do not suffice. Southern Utah Wilderness Alliance, 128 IBLA 382, 390 (1994). The Department is entitled to rely on the reasoned analysis of its experts in matters within their realm of expertise. King's Meadows Ranches, 126 IBLA 339, 342 (1993), and cases there cited. Thus, where BLM has evaluated the feasibility of the pipeline project proposed by MAPCO,

and has considered the objections of the Appellant labor union, it is not enough that Appellant offers a contrary opinion. In order to prevail, Appellant must demonstrate by a preponderance of the evidence that BLM erred in evaluating the data provided in reaching its conclusions. King's Meadows Ranches, *supra* at 342.

To determine whether a BLM decision granting an ROW application was based on a reasoned analysis of the facts and was made with due regard for the public interest, the Board looks to the agencies that are impacted from the proposal and their review of the proposal in light of the purposes for which the land they administer is dedicated. In this case, BLM determined that the project was supported by those agencies with responsibility for the lands involved because it was consistent with those purposes.

Appellant, however, finds fault with BLM's impacts' analysis, and especially its cumulative impacts analysis, as set forth in section 4.3 of the EA, and urges that it is not sufficiently detailed or specific to permit reasoned analysis because it allegedly fails to address all past, present, and future operations. (Memorandum at 31-33.) Respondent contends that BLM analyzed past and present activities in the cumulative impacts section of the EA within Chapter 4 and then concluded in that section that the incremental impacts of the project would be negligible. No more is required, they assert.

CEQ regulations require that a Federal agency must consider the potential cumulative impacts of a planned action together with other past, present, and reasonably foreseeable future actions. 40 C.F.R. § 1508.7; see Fritiofson v. Alexander, 772 F.2d 1225, 1243-44 (5th Cir. 1985); G. Jon and Katherine M. Roush, 112 IBLA 293, 305 (1990). Appellant charges that BLM arbitrarily narrowed its review of future activities to exclude those related to other pipeline activities located in the region. (Memorandum at 33.) Although Appellant asserts that BLM must show the statutory or regulatory basis for this unilateral and arbitrary reduction in the scope of its NEPA review, we find that the burden is on Appellant to show that such a guideline is unreasonable or illegal.

We find that the EA adequately considered the cumulative impacts of the MAPCO Loop Expansion Project. The EA assesses the current environmental condition of the selected route and details the current condition of various resources or areas of concern and the expected impact the proposed pipeline would have on them. (EA, Chapter 4.) BLM, moreover, met the standard established by the CEQ regulations at 40 C.F.R. Part 1500. Although BLM implicitly came to the conclusion that the MAPCO project could not be considered to be a connected or cumulative action when considered in the context of existing pipelines, related impacts resulting from foreseeable uses are presented in chapters 3 (Description of the Affected Environment) and in Chapter 4 (Environmental Consequences and Mitigation). Respondent did not analyze direct or indirect adverse effects from existing pipeline operations within the context of the EA because these operations are not, under applicable CEQ regulations, an impact of the decision.

approving the MAPCO pipeline project, but rather are an identified use of the land whether the MAPCO project is approved or not. See San Carlos Apache Tribe, 149 IBLA 29, 41 (1999).

BLM is required, in a single EA, to analyze the environmental impacts of a proposed action and any connected actions, even when such connected actions will not be undertaken by BLM or any arm of the Federal Government. 40 C.F.R. § 1508.25(a)(1); Save the Yaak Committee v. Block, 840 F.2d 714, 719-20 (9th Cir. 1988); Southern Utah Wilderness Association (SUWA), 122 IBLA 165, 168 (1992). Actions are deemed "[c]onnected if they: (I) Automatically trigger other actions * * * [;] (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously[; or] (iii) Are interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1). The concern evident in the regulation is to ensure that a Federal agency does not improperly limit the scope of its environmental review, thus ignoring the less obvious, but no less related, potential consequences of a proposed action, at a time when it is deciding whether to approve that action. See Sylvester v. U.S. Army Corps of Engineers, 871 F.2d 817, 823 (9th Cir. 1989); Thomas v. Peterson, 753 F.2d 754, 760 (9th Cir. 1985); SUWA, 122 IBLA at 168.

We are not persuaded that the existing pipelines in the present ROW or the proposed TransColorado pipeline are actions "[c]onnected" to the proposed MAPCO pipeline project, within the meaning of 40 C.F.R. § 1508.25(a)(1). We find no evidence that construction and operation of the proposed MAPCO pipeline will automatically trigger any action with regard to any other existing or proposed activity. Approval of another pipeline in the area, or the existing MAPCO pipeline, must undergo, or has already had to undergo, its own State and Federal permitting process, and each is totally unrelated to approval of the proposed MAPCO pipeline. See Hawkwatch International, Inc., 143 IBLA 67, 69-71 (1998); Concerned Citizens for Responsible Mining (On Reconsideration), 131 IBLA 257, 266 (1994); SUWA, 122 IBLA at 168-69; Uintah Mountain Club, 116 IBLA 269, 271-72 (1990); The Sierra Club, 104 IBLA 76, 86 (1988).

Nor can we say that the request for an additional ROW to satisfy significant petrochemical requirements, in the same location as the present MAPCO pipeline facility, is dependent, in any sense, on the earlier construction and operation of the existing pipeline. See Wilderness Watch, 142 IBLA 302, 305-06 (1998); SUWA, 122 IBLA at 169. We find no evidence that the proposed pipeline could not be undertaken in another location. Nor are the proposed pipeline and other existing or proposed activities interdependent parts of any larger action, especially since they each have substantial independent utility and could be separately pursued. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 298-300 (D.C. Cir. 1987); Concerned Citizens for Responsible Mining (On Reconsideration), 131 IBLA at 266; SUWA, 122 IBLA at 169.

We are also not persuaded that BLM was required to consider the potential environmental impacts of the existing facilities or other proposed pipeline at the time it prepared the EA at issue here, because such

impacts constitute the "indirect" effects of the proposed action. 40 C.F.R. § 1508.25 requires BLM to consider the "indirect" effects of its proposed action, which are defined as those

which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. [They] may include * * * effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems.

40 C.F.R. § 1508.8(b); see Sierra Club v. Marsh, 769 F.2d at 877-78; Mullin v. Skinner, 756 F. Supp. 904, 920-23 (E.D. N.C. 1990) (emphasis added). In order to conclude that a particular indirect effect is "cause[d]" by a proposed action, within the meaning of 40 C.F.R. § 1508.8(b), it must be shown that there is a "reasonably close causal relationship between a change in the physical environment [wrought by that action] and the effect at issue." Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983) (cited in James Shaw, 130 IBLA 105, 114 (1994)). Further, indirect effects must be considered even where they would be the consequence of non-Federal action that would take place solely on private property. See Sierra Club v. Hodel, 544 F.2d 1036, 1037-38, 1043-44 (9th Cir. 1976); City of Davis v. Coleman, 521 F.2d 661, 677 (9th Cir. 1975); James Shaw, 130 IBLA at 113-14.

However, we find no fault with BLM's determination that the impacts of approving the proposed action would be minimal at best, with the only identifiable impact worthy of mention relating to housing and congestion which might result when construction crews from the TransColorado pipeline and MAPCO pipeline were anticipated to be in the same area at the same time. Appellant has presented no evidence that the other proposed pipeline (TransColorado) will be affected whether or not BLM grants the proposed MAPCO ROW, nor has it shown that the existing MAPCO pipeline operation will be affected by this decision. Thus, it has failed to demonstrate the necessary causal link.

Thus, we hold that BLM's implicit determination that the various pipeline activities were not connected and that BLM's failure to consider the impact of the proposed action on the existing MAPCO pipeline or proposed TransColorado pipeline was not violative of section 102(2)(C) of NEPA. We find that 40 C.F.R. § 1508.25 did not require consideration of such illusory impacts, because construction/operation of the proposed MAPCO pipeline and the other referenced pipeline activities were not "[c]onnected actions" and because there are no identifiable "[i]ndirect" effects of construction/operation of the proposed MAPCO pipeline. Friends of the Nestucca, 144 IBLA 341, 359 (1998), appeal filed, Coast Range Association v. Shuford, No. 98-819-JO (D. Or. July 7, 1998); Wilderness Watch, 142 IBLA at 305-06; Concerned Citizens for Responsible Mining (On Reconsideration), 131 IBLA at 265-66; James Shaw, 130 IBLA at 114-15; SUWA, 122 IBLA at 168-69; The Sierra Club, 104 IBLA at 86-87.

Moreover, Appellant has failed to demonstrate that, by not considering such impacts, BLM has presented a "misleading picture" of the construction/operation of the proposed MAPCO pipeline in conjunction with the existing and proposed TransColorado pipeline activities. Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d at 299. While we agree with Appellant that the construction of another pipeline (TransColorado) in the area is a reasonably foreseeable future action, Appellant has offered no evidence and we find none that it will, together with issuing the ROW and building the MAPCO pipeline, have any "cumulative impact" on the environment which BLM failed to adequately consider. See 40 C.F.R. § 1508.25; see also SUWA, 127 IBLA 282, 285-90 (1993); Colorado Environmental Coalition, 108 IBLA 10, 16-18 (1989). It must be remembered that BLM is not, by virtue of the cumulative impact analysis mandate of 40 C.F.R. § 1508.25, required to consider all of the impacts of the other proposed pipeline and existing MAPCO pipeline on the environment, but simply to assess the impacts of issuing the ROW grant "when added to" those of the existing or other proposed activities. 40 C.F.R. § 1508.7; Landmark West! v. U.S. Postal Service, 840 F. Supp. at 1010-11. In this respect, Appellant has failed to show error.

We, therefore, conclude that BLM did not, by not specifically addressing the impacts to be expected from the proposed MAPCO project on the activities represented by the existing MAPCO pipeline and the proposed TransColorado pipeline, fail to fully consider the cumulative environmental impacts in its EA, or improperly limit the scope of its environmental analysis, in violation of 40 C.F.R. § 1508.25. Rather, we are convinced that, in all respects, the overall aim of section 102(2)(C) of NEPA to promote informed decisionmaking has been amply fulfilled. SUWA, 122 IBLA at 170.

Next, Appellant indicates that BLM failed, in its EA, to adequately address the impact of construction activities on the Federally-listed endangered species as outlined in Appellant's and Respondent's arguments above, and as reflected in their briefs. We find no violation. BLM considered the impact in the EA and in its BA, concluded that any and all activity associated with construction, operation, and maintenance of the proposed pipeline would, given adopted project design features and mitigation measures, not adversely affect the species addressed. (EA at 3-30 to 3-48, 4-26 to 4-42; BA, dated July 1998, at 3-1 to 3-57.) More importantly, the depletion of water identified by the USFWS in two river systems to be crossed by the pipeline construction and its impact on certain endangered fish species will be mitigated by measures described in the BO such that there will be no jeopardy to threatened or endangered species or adverse modification of critical habitat. See FONSI at 4-5. Each of the affected and potentially affected plant and animal communities has been carefully reviewed and mitigation measures developed. The minor distinctions between the language used in the EA and BA raised by Appellant are both nonsubstantive and do a significant injustice to the BLM effort to consider all real environmental concerns that might be encountered in completing the pipeline project.

Next, Appellant contends that BLM violated section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E) (1994), because it did not consider reasonable

alternatives to the proposed pipeline that would have a lesser impact on the environment. NEPA requires that an EA consider "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii) (1994). Regulations of the CEQ provide that Federal agencies shall, to the fullest extent possible, "[u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment." 40 C.F.R. § 1500.2(e). Further, agencies shall "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a). Agencies need not discuss alternatives that would not satisfy the purposes of the proposed action or that are remote and speculative. Headwaters, Inc. v. BLM, Medford District, 914 F.2d 1174, 1180-81 (9th Cir. 1990); City of Aurora v. Hunt, 749 F.2d 1457, 1467 (10th Cir. 1984); Roosevelt Campobello International Park Commission v. U.S. Environmental Protection Agency, 684 F.2d 1041, 1047 (1st Cir. 1982). In a leading case on the requirement to discuss alternatives, Judge Leventhal stated that "the alternatives required for discussion are those reasonably available * * *." Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972). Judge Leventhal continued: "In the last analysis, the requirement as to alternatives is subject to a construction of reasonableness * * *." Id. at 837.

In the EA, BLM analyzed the proposed action alternative, the required no-action alternative, and considered but rejected four system modifications and four route alternatives. Appellant's argument with respect to the adequacy of alternatives contends that the discussion of these rejected system modifications and route alternatives is wholly inadequate and completely lacking in technical data to support their elimination.

We find that Appellant has failed to establish that BLM's decision to eliminate these alternatives was either arbitrary, capricious, or an abuse of discretion. See 5 U.S.C. § 706(2)(A) (1994). Under 40 C.F.R. § 1502.14(a), an agency is required to "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which are eliminated from detailed study, briefly discuss the reasons for their having been eliminated." (Emphasis added.) BLM more than adequately discussed the reasons for eliminating each of the system modification alternatives (EA 2-29 to 2-30) and each of the route alternatives (EA 2-30 to 2-37). Appellant demands more detail, asserting that it is legally required. We are not persuaded. BLM has provided a concise but compelling description of its reasons for nonconsideration, more than satisfying the brief discussion called for by the regulation. Appellant has shown no error. In this case, the greater public interest and the welfare of the region favor putting a second pipeline largely along MAPCO's existing ROW, and over the 412 mile proposed track.

Finally, we find that Appellant's claim that mitigation measures necessary to ensure compliance are inadequately described in the EA and DR is without merit. Appellant contends that NEPA and its implementing regulations require that the "effectiveness" of the planned mitigation measures be analyzed and discussed during the NEPA process. (Memorandum at 25.)

We find no merit to Appellant's argument. Details of mitigation measures are not required to be set forth in the EA. As the Supreme Court stated in Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989): "To be sure, one important ingredient * * * is the discussion of steps that can be taken to mitigate adverse environmental consequences." However, the Court cautioned that "[i]t would be inconsistent with NEPA's reliance on procedural mechanisms--as opposed to substantive, result-based standards--to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act." Id. at 353.

The environmental concerns raised by Appellant were carefully considered during the environmental assessment process and significant changes were made to the EA as a result of the comments of Appellant and other commenters. Appellant's contention that the EA is inadequate in addressing these concerns is without merit. In sum, it is clear from the record that BLM has adequately considered all relevant factors, including the impact to the environment, regarding its decision to grant the 412-mile ROW necessary for increased petrochemical deliveries to the citizens of five Western states. Further, Appellant's labor union has shown no compelling reason to modify or reverse BLM's decision. Therefore, we conclude that BLM properly granted MAPCO's ROW request that sought to provide needed petrochemical resources to the citizens of several Western States.

Other claims of Appellant not specifically addressed herein have been carefully reviewed and determined to be without merit. Appellant's Motion to Set Aside and Request for Hearing, filed with its NOA, are denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

James P. Terry
Administrative Judge

I concur:

John H. Kelly
Administrative Judge